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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

No. 368

MICHAEL B. TENORE and JOSEPH SCARAMUZZO, co-partners doing business as RICO SALES COMPANY, a partnership,

*Petitioners,*

*vs.*

AMERICAN AND FOREIGN INSURANCE COMPANY OF NEW YORK, et al.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Schaffer Press, Inc.—ANdover 3-6850

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IN THE

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OCTOBER TERM, 1957.

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**No.**

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MICHAEL B. TENORE and JOSEPH SCARAMUZZO, co-partners doing business as RICO SALES COMPANY, a partnership,

*Petitioners,*

*vs.*

AMERICAN AND FOREIGN INSURANCE COMPANY OF NEW YORK, et al.,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, Michael B. Tenore and Joseph Scaramuzzo, co-partners doing business as Rico Sales Company, a partnership, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case, which reversed, without remand, the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

## JUDGMENTS AND OPINIONS OF THE COURTS BELOW.

The Findings of Fact, Conclusions of Law and judgment of the United States District Court for the Northern District of Illinois, Eastern Division, were entered on July 23, 1957, and are not reported but appear in the printed Appendix filed with and certified by the Clerk of the Court of Appeals as part of the Record and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, reversing said judgment, was filed June 19, 1958, and is not yet reported but is set forth in the Appendix hereto, and in the certified copy of the Record.

## JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit reversing the judgment of the District Court was filed June 19, 1958. On July 29, 1958, it was ordered that the Petition for Rehearing be denied. (These orders appear in the Appendix hereto). This petition is filed within 90 days of the entry of the order of reversal in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED.

1. In the absence of legislation, may a Court of Appeals determine "intentional false swearing as a matter of law"?

2. Is not a court making such determination legislating rather than adjudicating?

3. Where there is no contention that the findings of fact of the trial court are not supported by the record,

and no expression by the Court of Appeals that the findings of the trial court are clearly erroneous, and neither expression nor intimation that due regard has been given to the trial court's opportunity to judge credibility, and no expression that there has been an error or misinterpretation of law, is not a reversal by the Court of Appeals a complete usurpation of the trial court's jurisdiction and a total disregard of Rule 52 (a) of the Federal Rules of Civil Procedure?

4. Where a trial court's determination based on oral testimony, not in conflict with contemporaneous documentary evidence or with undisputed fact, is set aside and reversed, is not the effect the nullification of the office of trial, and of Rule 52(a) of the Rules of Civil Procedure, which requires due regard to the trial court's opportunity to judge the credibility of the witnesses?

5. Where a Court of Appeals disregards the findings of a trial court and substitutes its own findings and interpretation of the evidence; does it not reinstate the trial *de novo* at the appellate level, long obsolete in the federal system and render opinions of the trial court purely advisory?

## STATEMENT OF THE CASE.

The complaint, brought under 28 U.S.C. 1332 based on diversity of citizenship and requisite jurisdictional amount, alleged that the plaintiffs-petitioners, citizens and residents of the Northern District of Illinois, were insured by the several defendants-respondents against loss by fire to the contents of a mail order gun shop on premises maintained by the said plaintiffs-petitioners at 5737 West Division Street, in Chicago, Illinois; that such insurance was in the aggregate amount of $80,000.00;

that on October 10, 1951, while the several policies were in full force and effect, a fire occurred on said premises, totally destroying all the contents described in said policies; that requisite notice of the happening of the fire was forthwith given defendants-respondents, and within proper time sworn statements and proofs of loss in the aggregate of $78,698.34 were filed with the several defendants-respondents; that the plaintiffs-petitioners had done all things required of them under the policies of insurance, but defendants-respondents refused payment; that judgment was demanded in the amount set forth in the proofs of loss, plus interest for vexatious delay in payment, plus costs.

The defendants-respondents filed a joint answer denying plaintiffs-petitioners had any insurable interest in the premises; that plaintiffs-petitioners had not done all the things required of them under the several policies in that (1) they falsely swore in the proofs of loss that the cause and origin of the fire was unknown to them when they knew the fire was of incendiary origin, (2) they falsely swore the cash value of the property insured was $78,698.34, when they knew the cash value was less than $15,000.00, (3) they falsely swore their loss and damage was $78,698.34, when they knew their loss was less than $7,500.00; that therefore, the policies of insurance became and were void and of no force and effect under a clause common to all said policies which provided:

> "The entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material facts and circumstances concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

The cause was heard by a judge of the District Court for the Northern District of Illinois, Eastern Division, sitting without a jury. He found the issues in favor of the plaintiffs-petitioners and entered his Findings of Fact, Conclusions of Law and Judgment in their favor in the amount of $20,000.00.

Appeal was taken therefrom by the defendants-respondents on the single issue as to whether the petitioners fraudulently and falsely swore in the proofs of loss to the value of the property destroyed. All other issues were abandoned.

The Seventh Circuit reversed, without remand, on the ground that these plaintiffs-petitioners knowingly made false statements with regard to the value of the property destroyed, with an intent to defraud.

## THE EVIDENCE

The grounds for appeal and those invoked for reversal are based solely upon the acts of the petitioners, in swearing in their proofs of loss submitted that their loss was in the amount of $78,698.34, when the court found damage in the amount of $20,000.00.

The contents involved in the fire were composed of 532 items or lots of guns and gun parts, the first 161 of which were made up of one gun each, all of which had been removed by agreement of the parties, to a warehouse owned by several insurance companies, including the respondents. There the contents were examined and inventoried by the plaintiffs, and the inventory there made was affixed to the proofs of loss. The petitioner Tenorg testified that he and his co-petitioner together with one Masse and one Hunt, *an employee of the warehouse*, went through the stored contents first identifying

it, and by reference to catalogues they would attempt to find the article identified; that they made a standard on a number of the items for the same price "like in one instance of $60.60 for shotguns, and some of them went up to $150 and others probably wouldn't be worth more than $50, but they run a blanket price on them to get through". In those instances where the item could not be identified from the catalogue, the co-petitioner, Scaramuzzo, a gunsmith all of his life and engaged in the buying and selling of firearms, testified that the values on the inventory were arrived at from catalogues or lists and where neither was available, he assigned a value himself based upon his opinion, a product of his experience. In regard to the $60.60 price, he took it from the Faber Bros. Wholesale catalogue of a new 12 gauge Winchester 97, though guns in the fire were manufactured between 1883 and the early 1900's. In his opinion the older used guns were more valuable than the new, because of their age and the fame of the original owners. He used the same procedure in assigning all prices on the inventory. If derived from a catalogue price or a listed price of an article of the same or a similar description, he identified such catalogue price or list and it was submitted into evidence as corroboration. Where the inventory was based on his opinion, no inventory or list being available, he so stated. Nick Masse, an insurance broker who had arranged for the coverage, testified similarly that in making the inventory, Hunt would pick up the article, Scaramuzzo would identify it, and Hunt listed it on the inventory; that the following day Scaramuzzo, Tenore, Hunt and the witness determined the values on the inventory by looking for it in the catalogue or, when it was not available in the catalogue getting Scaramuzzo's opinion as to value; that they relied in fixing prices upon

Scaramuzzo and his catalogues; that, after such determination, Masse affixed the figures thereto.

On behalf of the respondents, Fenton P. James, staff assistant to the general sales manager at the Winchester factory, testified that, in his opinion, the 65 Winchesters involved in the fire did not have a value equal to the price of a new gun. He testified that from his examination of the guns after the fire, he was not able to determine their condition as they existed before the fire. Fletcher Woodcock, sales manager for Ithaca Gun Factory, testified that in his opinion the twelve Ithaca Guns were worth between $5.00 and $7.50 each, basing that valuation on the possibility of salvaging replacement parts from them and basing that opinion on other guns he had seen of the same vintage. Albert Baker testified, as an expert, that his opinion of the composite value of the stock involved in the fire was $9,587.99; John L. Neill testified, as an expert on behalf of the respondents, that his opinion of the composite value of the stock involved in the fire was $1,500.00; John F. Lovell testified, as an expert on behalf of the respondents, that his opinion of the composite value of the stock involved in the fire was $15,727.19; John T. Amber testified, as an expert on behalf of the respondents, that his opinion of the composite value of the stock was $13,290.25 to $15,796.73.

## JUDGMENT OF THE DISTRICT COURT.

On the basis of all of the foregoing testimony the trial court entered its findings of fact and conclusions of law providing in pertinent part:

### Findings of Fact.

* * *

"14. On the 10th day of October, 1951, while the said policies of insurance, and each of them, were in

full force and effect, a fire occurred in the said premises.

"15. Said fire damaged and substantially destroyed all of the contents described in the said policies of insurance, and located at and contained in the said premises occupied by the plaintiffs.

"16. Within the time provided therefore, subsequent to the happening of the said fire and loss of damage resulting therefrom, the plaintiffs gave notice thereof in writing to the defendants and each of them.

"17. Within the time provided, therefore, the plaintiffs filed with said defendants, sworn statements and proofs of loss in the total amount of $78,698.34. That the amount claimed in said proofs of loss as to each of the defendants is as follows:

| Insurance Company | Policy Number | Amount of Policy | Amount Claimed |
|---|---|---|---|
| American and Foreign Insurance Company of New York | 337027 | $20,000.00 | $19,674.59 |
| Centennial Fire Insurance Company of New York | 19549 | 10,000.00 | 9,837.29 |
| The Commercial Union Fire Insurance Company of New York | 21846 | 5,000.00 | 4,918.64 |
| Continental Insurance Company | 5503 | 5,000.00 | 4,918.65 |
| Detroit Fire and Marine Insurance Company | 969267 | 10,000.00 | 9,837.29 |
| The American Insurance Company of Newark, New Jersey | 388584 | 10,000.00 | 9,837.29 |
| The Home Insurance Company | 83785 | 10,000.00 | 9,837.29 |
| Old Colony Insurance Company | 435848 | 10,000.00 | 9,837.29 |
| | | $80,000.00 | $78,698.34 |

"18. The plaintiffs have performed all of the acts and things required under the said policies of insurance, including, inter alia:

(a) An averment under oath that the cause and origin of the fire was unknown to the said plaintiffs.

b. An averment under oath that the cash value of the property of the plaintiffs insured under defendants' policies at the time of the fire was the sum of $78,698.34.

c. An averment under oath that the said property was totally destroyed.

"19. The plaintiffs, when required so to do by the defendants have exhibited to the representatives of the defendants whenever designated, all that remains of the property herein described.

"20. The plaintiffs, when so required by the defendants, have submitted to examinations under oath before persons designated by the defendants and have subscribed to the same.

"21. The cause and origin of the fire occurring in the premises commonly known as 5737 West Division Street on the 10th day of October, 1951, is undetermined and was and is unknown to the plaintiffs.

"22. That the cash market value of the property of the plaintiffs insured under defendants' policies at the time of the fire, constitutes the sum of $1,060.00 for furniture and fixtures and a sum of $18,840.00 for stock in trade.

"23. That the property of the plaintiffs insured under defendants' policies, was substantially destroyed because and as a result of the fire described hereinbefore." (Defendant-Appellant's App. pp. 652-4)

Conclusions of Law.

"1. The court has jurisdiction of the subject matter and parties to this action.

"2. The plaintiffs, and each of them, had on the 10th day of October, 1951, an insurable interest in the contents of premises occupied by them in the building located at 5737 West Division Street, Chicago, Illinois.

. . . .

"4. That because of the fire there occurring on the 10th day of October, 1951, the defendants became liable to the plaintiffs in the aggregate sum of $20,000.00.

"5. That the plaintiffs have to the best of their knowledge and belief, performed all of the acts and things required under the policies of insurance as hereinabove described.

"6. That there was no intent or act on the part of the plaintiffs in performing such acts or things that will sustain any affirmative defense concerned with fraud on the part of the said plaintiffs." (Defendants-Appellants' App. pp. 654-5)

Whereupon, that court entered judgment for these petitioners in the aggregate amount of $20,000.00.

## REASONS FOR GRANTING WRIT.

A. The subject concerns the enforcement of Rules, which by law it is the duty of this Court to formulate and put into force. Certiorari should be granted and this Court's plenary power of supervision exercised where the action of a lower court is so palpably improper as to place if beyond the scope of the rule invoked and, for all practical purposes to effect the nullification of the Rule. *Cf. Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 706; *La Buy* v. *Howes Leather Company*, 352 U.S. 249, 256.

1. A Court of Appeals is forbidden from making new findings of fact.

In pertinent part, Rule 52(a) provides that "Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." In the case at bar, the findings of the trial judge have

not only been set aside, they have been ignored, and upon a *de novo* review of the record, a trial by deposition, the Court of Appeals for the Seventh Circuit has made its own findings and conclusions in complete disregard of the prohibition of statute, custom and rule, which obtains even though the Court of Appeals may believe they are demanded by the record. *Waialua Agricultural Co.* v. *Maneja*, 216 F. 2d 466, 474; reversed on other grounds, 349 U.S. 254. With what little recognition the Court of Appeals gave the trial court's having made findings, it held:

> "Had Scaramuzzo valued five, ten or possibly twenty guns at an excessive price, and had displayed some effort to make an honest evaluation as to the other guns, although we might disagree, we would feel bound by the decision on valuation made by the trier of facts." (Op. 12179, p. 5)

This statement was made in contemplation of oral testimony given at trial and in the face of the trial record, wherein insofar as it reflects the demeanor of the witness, the trial court found his testimony frank and non-evasive (App. 274-5), and in a reflection of the trial court's reaction, after a "view" of the condition and magnitude of the salvage, that it would be practically impossible not to make a fair number of errors (App. 632).

2. This record does not support the firm and definite conviction that a mistake has been made by the trial court, as contemplated by this Court's ruling in *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364.

The foregoing quoted statement, rejecting and denying that the co-petitioner Scaramuzzo had "displayed some effort to make an honest evaluation" was made in the

face of value discrepancies on the part of respondent's witnesses of 1053%. What, then, is the Court of Appeals' standard of honest evaluation? Where, on this record, is the undisputed evidence which speaks with such commanding force as to overcome the evidence offered by the petitioners, or to leave the reviewing court with a definite and firm conviction that a mistake had been committed? *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395. "It would be just as logical to say that because of such discrepancy the testimony of the defendants' witnesses was fraudulent. Neither conclusion follows." *Weiniger et al.*, v. *Metropolitan Fire Insurance Co. et al.*, 359 Ill. 584, 599.

> "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses, the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth. * * * How can we say the judge is wrong? We never saw the witnesses. * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd* v. *Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634." *United States* v. *Oregon State Medical Soc.*, 343 U.S. 326, 339.

Nor, in the light of the entire record, can it be said that such "unusual circumstances" are here present as to fall within the exception of the Seventh Circuit's own adopted doctrine in applying the mandate of this Court founded in the *Gypsum* case, *supra*:

> "In applying the doctrine stated in the *Gypsum* case, the Court of Appeals for the Second Circuit said in *Orvis* v. *Higgins*, 180 F. 2d 537, 539: * * *

Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is party oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own: (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But, where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances." *Arnold Corp.* v. *Stansen Corp.*, 489 F. 2d 5, 10 (7 Cir.)

3. The decision of the Court of Appeals directly contradicts the rule of its own case, upon which it relies.

We refer to *American Home Fire Assurance Co. et al.* v. *Jensen State Company*, 7 Cir., 78 F. 2d 1001, quoted in this opinion at pp. 5 and 6, which states, in part, as follows:

". . . Upon appeal this Court reversed the trial court and said, pages 1002-1003: 'We would have no difficulty accepting the views expressed in *Weisman* v. *American Insurance Company*, 184 Wis. 523, 199 N.W. 55, 200 N.W. 304, *if the record before us showed any possible basis for the discrepancy in values through difference of opinion as to value.*' . . ." (Op. 12179) (Emphasis supplied)

4. The decision of the Court of Appeals is in direct conflict with that of the Tenth Circuit in *American Eagle Fire Insurance Co.* v. *Burdine*, 200 F. 2d 26. Ultimately the question necessarily arises, as to whether Rule 52(a) is so flexible as to countenance two diametrically opposed

effects in strikingly similar circumstances. If that question can be answered in the affirmative, then the rule does not effect the purpose of the legislation that gave the rule its vitality. The purpose of Rule 52(a) as of all the Rules of Civil Procedure, was "to secure one form of civil action and procedure . . .". It cannot be said that that purpose has been accomplished if the opinion in this case is allowed to stand side by side with the opinion of the Tenth Circuit in *American Eagle Fire Insurance Co.* v. *Burdine*, 200 F. 2d 26.

5. The Court of Appeals has exceeded its powers respecting judicial notice.

The decision herein stipulates that ". . . we feel quite certain that hacking off a part of the barrel does not give such a gun the valuation of a similar type gun which has never been used." (Op. 12179, p. 5). We submit that neither general knowledge nor the requisite notoriety exists to support this statement. *Brown* v. *Piper*, 91 U.S. 37; *Leong Kim Wai* v. *Burnett*, 23 F. 2d 789 (C.A. 9).

B. If this decision is allowed to stand, it will set litigious precedent. This Court should exercise its powers of supervsion because a question is presented herein both fundamental and far-reaching in Federal civil law.

1. In the absence of legislation to that effect, intentional false swearing cannot be determined as a matter of law. Most particularly objectionable are the innovations in established rules of law that must necessarily have effect beyond the four corners of this opinion, contemplating that this opinion will be published and that the nature of the case is not unusual in normal litigation. Mr. Cooley, as supporting authority, is leaned upon for

solution of a district court decision with which the Seventh Circuit did not agree, wherein he is quoted ". . . there is a point where the question of fraud and false swearing becomes one of law, and beyond which the insured cannot be heard to say that his intent was innocent." (Op. 12179, p. 4) Mr. Cooley so stated as a subdivision to his basic premise cited as general rule that it is for the jury to say whether there has been any fraud and false swearing. Even the quoted provision is explained and amplified by Cooley to resolve itself into the question of whether the fraud has been conclusively shown. The partial quotation, as an authority for the Court of Appeals' opinion, must evaporate in the face of the trial court's ruling that

> "6. There was no intent or act on the part of the plaintiffs in performing such acts or things that will sustain any affirmative defense concerned with fraud on the part of the said plaintiffs." (App. 654-5).

The Court of Appeals' opinion proceeds:

> "We must, of course, take the evidence most favorable to the plaintiffs, but we are not required to consider the obviously false testimony of Scaramuzzo." (Op. 12179, p. 4)

The latter part of the statement is an obvious flouting of the rule that "due regard shall be given the trial court's opportunity to judge the credibility of the witness." Nor is recognition made of the requirement. But were we to accept the Court of Appeals' view, what happened to the testimony of Tenore and Masse in taking the "evidence most favorable to plaintiffs"? Ignoring the evidence most favorable to plaintiffs, the Court of Appeals continued:

"Although many of the guns were in the junk class with missing parts, cracked stocks, sawed off barrels, and practically all were more than fifty years old, Scaramuzzo swore in his testimony and in the proofs of loss that they were each worth $60.60, the catalogue price of a new gun. *This was intentional false swearing as a matter of law.*" (Op. 12179, p. 4; Emphasis supplied).

Again ignoring the factual inaccuracies of the statement, the Court of Appeals has enunciated a rule of law that runs afoul of all established law regarding intent, as a process of the mind, being ever basically a question of fact.

2. The decision of the Court of Appeals is in direct conflict with that of the Eighth Circuit in *Imperial Assurance Co.* v. *Joseph Supronich and Son*, 184 F. 2d 930.

". . . Mere over-valuation in proofs of loss, however, is not conclusive of fraud. There must have been an intent to deceive, and in the absence of satisfactory proof of intent to deceive, the over-valuation will be presumed to be innocent and not fraudulent. . . ." (p. 935)

## CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDIX A.

IN THE

## UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 12179 SEPTEMBER, 1957 TERM — APRIL, 1958 SESSION

MICHAEL B. TENORE and JOSEPH SCARAMUZZO, co-partners doing business as RICO SALES COMPANY, a partnership,
*Plaintiffs-Appellees,*
v.
AMERICAN AND FOREIGN INSURANCE COMPANY OF NEW YORK, et al.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 19, 1958.

Before DUFFY, *Chief Judge*, and SCHNACKENBERG and HASTINGS, *Circuit Judges*.

DUFFY, *Chief Judge*. Plaintiffs bring this action on eight policies of fire insurance covering contents of a mail order gunshop located on West Division Street, Chicago, Illinois. The total amount of the policies was $80,000.00. A fire occurred on October 10, 1951. The proofs of loss submitted by plaintiffs were for $78,698.34. The case was tried to the Court. A judgment was entered in favor of plaintiffs in amounts aggregating $20,000.00.

In late July, 1951, plaintiffs entered into an equal partnership agreement to engage in "the business of buying,

selling, trading of Guns, Gun parts, Surplus goods, Military goods, etc.", under the name of Rico Sales Company. Plaintiff Scaramuzzo had been engaged in the gunsmith business for some thirty years. In 1947 he set up a separate mail order business which he operated under the firm name of Rico Sales Company. He continued in the mail order business until late 1949 or early 1950. The partnership hereinbefore described was to reactivate and carry on under the old name of Rico Sales Company but from a new address, 5737 West Division Street, Chicago.

About the time of the removal of the stock to the new location, plaintiff Tenore arranged through a broker, to insure the personal property of the partnership for $80,000.00, and the policies of insurance were duly issued. One insurance company desired an inspection of the property and contents, and arranged for an appointment at the premises on October 10, 1951 at 10 a.m. When the parties arrived at the scheduled hour on October 10th, they discovered that during the night a serious fire, accompanied by explosions, had seriously damaged plaintiffs' property. The nature of the fire aroused suspicion and the origin of the fire was investigated, but the Chicago Fire Department listed the cause as "undetermined."

After the fire the windows and doors of the building were open, and the contents largely unprotected. By agreement of the parties concerned, the guns, gun parts and related merchandise were removed to a designated warehouse. The merchandise was sorted and placed on tables and the two plaintiffs made an inventory. The actual pricing or valuing of the merchandise was done later by Scaramuzzo, and he placed a value thereon of $78,698.34. This sum was incorporated into the sworn proofs of loss. The companies refused to pay, their principal defense being that the policies sued upon became and were rendered void because of the wilful and false swearing of the plaintiffs with respect to the value and loss of the property insured. Each of the policies here involved provided "The entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any

material facts or circumstances concerning this insurance or the subject thereof, * * * or in case of any fraud or false swearing by the insured relating thereto."

The inventory was divided into 532 items or lots. The first 161 lots were made up of one gun each. All of these guns had been used. Forty-five were listed as riot shotguns which although of 12 guage had barrels of only twenty inches in length. A number of the guns were sawed-off shotguns, the sawing having been done in a crude manner. A number of the guns had cracked stocks, some of which had been wrapped with wire, others had no stocks at all. Still others were unusable because of missing parts. Sixty-six of the guns were Winchesters and ten were of the Ithaca make. Fifteen of the lots were parts for Thompson Machine guns.

The first sixty-five lots had been shipped out from the Winchester factory during the years from 1893 to 1912 except for one shipped in 1913 and two in 1917. The value which Scaramuzzo placed on these guns was $60.60 each, which was the catalog wholesale price for a new gun. His total for these guns was $3,939.00. A sales expert from the Winchester factory explained these guns were not collector's items as more than a million had been manufactured and sold. His total valuation for the sixty-five guns was $667.50.

The twelve Ithaca guns had been shipped to Wells Fargo Express Company between 1909 and 1917. They were listed as riot guns and had twenty-four inch barrels. Scaramuzzo valued these guns at $60.00 each, irrespective of previous condition. The sales manager for Ithaca Gun Company described the Ithaca guns as follows: "All these guns were in very, very bad condition. They were all guns made prior to the general use of smokeless powder. * * *" For some reason the trial court struck out the testimony of this witness to the effect that it would be dangerous to use present-day heavy loads in these guns. The Ithaca expert valued these guns at from $5 to $7.50 each.

The trial court disregarded the testimony of the foregoing witnesses and stated that he chose to take the valu-

tion of witnesses Lovell and Amber. Lovell is employed in the post office at Elmhurst, Illinois. He testified his "business on the side is gun parts." At one time he was an officer of the Illinois State Rifle Association. Lovell valued the entire inventory at $15,727.19. The witness Amber who is editor of the "Gun Digest" is also a gun collector. His valuation was from $13,290.25 to $15,796.73. The District Court said that he was adding something to the figures given by witnesses Lovell and Amber and came up with the final valuation of $18,940 for the stock in trade and $1060 for furniture and fixtures, or a total valuation of $20,000.00. The figure is $58,698.34 less than the valuation as sworn to by the plaintiffs.

Ordinarily the question of fraud is a question of fact to be determined by a jury or by the trial court if sitting without a jury. However, as said by Cooley in his Briefs on Insurance, Second Edition, page 5864: "* * * there is a point where the question of fraud or false swearing becomes one of law, and beyond which the insured cannot be heard to say that his intent was innocent." We must, of course, take the evidence most favorable to the plaintiffs, but we are not required to consider the obviously false testimony of Scaramuzzo. Although many of the guns were in the junk class with missing parts, cracked stocks, sawed-off barrels, and practically all were more than fifty years old, Scaramuzzo swore in his testimony and in the proofs of loss that they were each worth $60.00, the catalog wholesale value of a new gun. This was intentional false swearing as a matter of law. Even the trial court characterized Scaramuzzo's valuation as "fantastic" (Appendix 634).

It, apparently, was the theory of the trial court that as plaintiff sustained a substantial loss by reason of the fire and as defendants did not pay out any money and thus were not deceived by plaintiffs' claims, the actual loss sustained should be paid by the insurance companies. This approach ignores the fact that this is an action based on eight contracts. Each contract provided the policy shall be void if the insured wilfully misrepresented a material

fact or in case of false swearing by the insured with reference to a material fact.

Statements in an opinion by the Fifth Circuit in *Chaachou v. American Central Insurance Company*, 5 Cir., 241 F.2d 889, 892, 893, are in point: "The contract does not spell out that it is only false swearing, misrepresentation, concealment or fraud which is successful that avoids the policy. * * * A judge-made policy which thus gives advantage to dishonesty will retard, not accelerate, the orderly adjustment of insurance losses."

The deliberate exaggeration of values made by Scaramuzzo is equally binding upon plaintiff Tenore for it is clear from the evidence that the latter entrusted to his partner, Scaramuzzo, the duty of making such valuation, and he joined in the proof of loss.

Had Scaramuzzo valued five, ten, or possibly twenty guns at an excessive price, and had displayed some effort to make an honest valuation as to the other guns, although we might disagree, we would feel bound by the decision on valuation made by the trier of the facts. But here, plaintiffs gave a new-gun valuation to every one of the sixty-six Winchesters and the ten Ithacas. Ignoring the fact that practically every one of these guns had been manufactured and shipped more than fifty years ago, many of them were in the "junk" class with split stocks, sawed-off barrels and parts missing. We are not aware of any legitimate use for sawed-off shotguns, but we feel quite certain that hacking off a part of the barrel does not give such a gun the valuation of a similar type gun which never had been used.

In *American Home Fire Assurance Co., et al. v. Juneau Store Company*, 7 Cir., 78 F.2d 1001, this Court considered a case where the insured made a proof of loss in the sum of $73,000.00 under policies of insurance totaling the sum of $56,000.00. The jury returned a verdict of $33,000.00, and judgment was entered for the plaintiffs upon this verdict. Upon appeal, this Court reversed the trial court and said, pages 1002-1003: "We would have no difficulty

accepting the views expressed in *Wiesman* v. *American Insurance Company*, 184 Wis. 523, 199 N.W. 55, 200 N.W. 304, if the record before us showed any possible basis for the discrepancy in values through difference of opinion as to value. * * * On the other hand, responsibility cannot, or at least should not be avoided, because of a desire to see an insured who has suffered a loss collect his insurance. The applicable principle of law is clear. * * * Under the Wisconsin Standard Fire Insurance Policy, the insured, if he suffers a loss, must honestly state, under oath, the extent of his loss and give this information to the insurer. He must not make false proofs of loss with intent to defraud the insurer. Although the penalty is heavy and seemingly harsh, it is one way of stopping the presentation of false, fictitious or inflated claims. False and exaggerated claims seemingly go hand in hand with incendiarism. The court should therefore unhesitatingly act to prevent attempted frauds on the part of the insured."

Although the *Juneau Store Company* case was decided in 1935, the language is quite similar to the late decision of the Court of Appeals of the Fifth Circuit in *Chaachou* v. *American Central Insurance Company, supra.*

True, this Court was applying Wisconsin law in the *Juneau Store Company* case, but the provisions in the policies there in issue were similar in substance to those contained in the eight policies which are sued upon in the case at bar.

We think that the rule in Illinois is in accord with the principles hereinbefore stated. *Butler* v. *Security Insurance Company of New Haven, Conn.*, 244 Ill. App. 379; *Kavooras* v. *The Insurance Company of Illinois*, 167 Ill. App. 220, and *Ledford, at al.* v. *The Hartford Fire Insurance Co.*, 161 Ill. App. 233.

The general statement of the rule appears in 19 American Jurisprudence, § 1132: "Policies of fire and property indemnity insurance usually provide that any fraud or false swearing on the part of the insured, whether before

or after loss, shall relieve the insurer from liability. Under such a provision, f lse statements as to material matters wilfully made by the insured in proofs of loss with the intention of thereby deceiving the insurer will preclude any recovery on the policy by the insured; • • • If a false statement is knowingly made by the insured with regard to a material matter, the intent to defraud will be inferred, the law presuming every man to intend the natural consequences of his acts. • • • "

We hold that the plaintiffs in the case at bar knowingly and wilfully made false statements with regard to a material matter with an intent to defraud. By reason thereof the plaintiffs are not entitled to recover any sum under their policies. The judgment for the plaintiffs is

REVERSED.

## APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Thursday, June 19, 1958

Before

HON. F. RYAN DUFFY, *Chief Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. JOHN S. HASTINGS, *Circuit Judge*

MICHAEL B. TENORE and JOSEPH SCARAMUZZO, co-partners d/b/a RICO SALES COMPANY, a partnership,
*Plaintiffs-Appellees,*
v.
AMERICAN AND FOREIGN INSURANCE CO. OF NEW YORK, et al.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, WITH COSTS.

No. 12179

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, July 29, 1958

Before

Hon. F. Ryan Duffy, *Chief Judge*
Hon. Elmer J. Schnackenberg, *Circuit Judge*
Hon. John S. Hastings, *Circuit Judge*

Michael B. Tenore and Joseph Scaramuzzo, co-partners d/b/a Rico Sales Company,
*Plaintiffs-Appellees,*
v.
American and Foreign Insurance Co., Etc., et al.,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for rehearing of this cause be, and the same is hereby, Denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

## No. 368

MICHAEL B. TENORE AND JOSEPH SCARAMUZZO, CO-PARTNERS DOING BUSINESS AS RICO SALES COMPANY, A PARTNERSHIP,

*Petitioners,*

*vs.*

AMERICAN AND FOREIGN INSURANCE COMPANY OF NEW YORK, ET AL.,

*Respondents.*

## ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

DONALD N. CLAUSEN,
HERBERT W. HIRSH,
JOHN P. GORMAN,
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THE LAW PRINT WARREN PRINTING COMPANY, CHICAGO

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957.

**No. 368.**

MICHAEL B. TENORE AND JOSEPH SCARAMUZZO, CO-PARTNERS DOING BUSINESS AS RICO SALES COMPANY, A PARTNERSHIP,

*Petitioners,*

*vs.*

AMERICAN AND FOREIGN INSURANCE COMPANY OF NEW YORK, ET AL.,

*Respondents.*

## ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

This Answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit is respectfully submitted to this Honorable Court on behalf of American and Foreign Insurance Company of New York, a corporation, Centennial Fire Insurance Company of New York, a corporation, The Commercial Union Fire Insurance Company of New York, a corporation, Continental Insurance Company, a corporation, Detroit Fire and Marine Insurance Company, a corporation, The American Insurance Company of Newark, New Jersey,

a corporation, The Home Insurance Company, a corporation, and Old Colony Insurance Company, a corporation, respondents herein, and is in opposition to the Petition for Writ of Certiorari herein sought to review a judgment of the United States Court of Appeals for the Seventh Circuit.

## QUESTIONS PRESENTED.

1. Does a Court of Appeals have the power on review to reverse a finding of a trial judge, if, in its opinion, from an examination of the entire evidence, said finding is clearly erroneous?

## STATEMENT OF THE CASE.

Respondents herein adopt as their Statement of the Case that portion of the opinion of the United States Court of Appeals for the Seventh Circuit issued on June 19, 1958, and written by Chief Judge Duffy on behalf of a unanimous court which relates the factual circumstances giving rise to this controversy. Said statement of the case is found in Appendix A of the Petition for Writ of Certiorari herein filed by petitioners and appears at pages 1a through 4a of said Appendix.

Respondents are compelled to disregard the statement of the evidence found in the petition filed herein for the reason that said statement of the evidence is written to create the impression that one Frank Hunt, a salvage supervisor at a warehouse owned by the Underwriters Salvage Company and an agent of the respondents here, played a part in determining the value of the guns and gun parts herein in question. The italicizing of the clause descriptive of Hunt on page 5 of the petition gives rise to an inference clearly opposite to the facts found in the record of this cause.

In said record, at page 191, the following testimony appears:

> "The Court: As far as that is concerned, your testimony is that you had nothing to do with fixing values and you do not purport to know values—
> Mr. Hunt: That is correct, I don't know."

The trial judge, at page 956 of the record, in rendering his opinion on the questions herein presented, stated unequivocally that in the determination of values:

> "* * * the evidence showed that Mr. Scaramuzzo [one of the petitioners herein] is the one who made the decisions. Mr. Hunt had nothing to do with deciding, he merely wrote down the values."

## ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT.

Respondents respectfully submit that there is no good reason for this Court to grant the writ of certiorari herein sought. Although respondents can not help but desire the imprimatur of this highest court upon the decision heretofore rendered by the Court of Appeals for the Seventh Circuit, they are compelled to oppose the granting of this writ, as there is no vital question presented in this case to which this Honorable Court should devote itself. There is no federal question presented in this diversity action. There is no novel question here relative to the supervision of the Courts of Appeal, nor is there any conflict of decisions among the Courts of Appeal of the various circuits on any of the issues herein involved. Respondents respectfully submit that petitioners here seek nothing but a second review of the evidence by this highest tribunal.

The major emphasis of the Petition for the Writ of

Certiorari, as it was in the Petition for Rehearing submitted on behalf of petitioners here to the Court of Appeals for the Seventh Circuit, is an argument that a Court of Appeals has no right to examine the facts developed in the court below or to consider, on review, the inferences drawn from those facts by the trial judge. We respectfully submit that such an argument is without foundation and is neither supported by the Rules of Civil Procedure nor by any case cited by petitioners, either to this Court or to the Court of Appeals below.

Petitioners here, as they did in their Petition for Rehearing, protest that the Court of Appeals did not see the petitioner Scaramuzzo sit on the witness stand and swear that in his opinion the value of old and mutilated weapons of 1890 vintage is the same as that taken from the current manufacturers' catalogues. This testimony of the expert Scaramuzzo, a man who has been a gunsmith for almost his entire span of life, was not testimony as to a disputed occurrence which he had viewed or a disputed conversation or agreement to which he had been a part, but rather was testimony as to his opinion of the value of guns and gun parts. When that testimony was placed side by side with that of disinterested experts from many parts of the country, it appeared incredible. Respondents respectfully submit that a sober examination of the entire record in this case does more to betray petitioner's testimony than would an evasive look or a halting voice, which are the usual manifestations by which a trial judge gauges the demeanor of the witness before him.

Of more serious import, however, is petitioners' discussion of the nature, function and power of a Court of Appeals on review. Petitioner, in both its Petition for Rehearing and this petition, has continually chosen to disregard Rule 52(a) of the Rules of Civil Procedure and

those cases from this Court and the Courts of Appeals for the various circuits interpretive thereof.

Rule 52(a), governing actions tried without a jury, provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This Supreme Court has made clear that this provision does not straightjacket a Court of Appeals and reduce it to merely a rubber stamp for the approval of the action of a trial judge. In *United States of America* v. *U. S. Gypsum Co.* 333 U. S. 364, 92 L. Ed. 746, this Court stated:

> "* * * Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury (citations omitted), this Court may reverse findings of fact by a trial court where 'clearly erroneous'. The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however (citations omitted). A finding is 'clearly erroneous' when although there is evidence to support it the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U. S. 364, 395, 92 L. Ed. 746, 766.

There is no conflict among the circuits as to the application of Rule 52(a). The Court of Appeals for the Seventh Circuit is fully cognizant of, and has relied upon, the formulation of this Supreme Court. See *Wasserman* v. *Daar*, 11 Fed. Rules Serv. 26(f)1, Case 1.

In *American Eagle Fire Ins. Co.* v. *Burdine*, 200 F. 2d 26, relied upon by petitioners to point up the conflict which petitioners say exists between the Seventh and Tenth Circuits, the Court of Appeals for the Tenth Circuit, after a discussion of the evidence in which it appeared that the preparation of a certain report under the advice of counsel was susceptible to either the inference that it had been made under an honest mistake of judgment or through fraudulent intent, stated in 200 F. 2d at page 28:

> "In these circumstances the trial court's conclusions are not clearly erroneous and they must stand."

It is obvious that if the Court of Appeals had found, as the Court of Appeals for the Seventh Circuit has found here, that the findings of the trial judge were clearly erroneous, that court would have considered itself at liberty to set said findings aside.

Likewise *Waialua Agricultural Co.* v. *Maneja*, 216 F. 2d 466, relied upon by petitioners here, is inapposite. In that case, brought under the Fair Labor Standards Act, the Court of Appeals for the Ninth Circuit held that it could not make new findings to supplement those findings already made by the trial judge, where said additional findings would be necessary for a proper decision of the controversy before it. However, it positively held that it could reverse "clearly erroneous findings" of the court below. We are unaware of any Court of Appeals which has so abdicated its function as a court of review that it would consider such a statement of the law either improper or erroneous.

Respondents respectfully submit that there is no conflict existing between the Court of Appeals of the Seventh Circuit and that of the Eighth Circuit as petitioners claim at page 16 of their Petition. Petitioners rely upon the case of *Imperial Insurance Co.* v. *Joseph Supronick*,

*Sons*, 184 F. 2d 930, to illustrate such a conflict. In that case, which was, as this one, a diversity action, the Court relied upon the law of the State of Minnesota in affirming a decision of the trial court that an insured was entitled to recover on its policies of insurance. The court relied upon and quoted from *National Fire Ins. Co. v. Itasca Lumber Co.*, 148 Minn. 170, 181 N. W. 337, and stated at page 935:

> "As a general rule it is for the jury to say whether there has been any fraud or false swearing."

Neither the Supreme Court of the State of Minnesota nor the Court of Appeals for the Eighth Circuit stated that the "general rule" precludes an appellate court from setting aside a clearly erroneous finding by a *nisi prius* court.

We, further, respectfully bring to the Court's attention the fact that petitioners have argued in their Petition for Rehearing submitted to the Court of Appeals for the Seventh Circuit, that that court, by relying in this case upon its decision in *American Home Ins. Co. v. Juneau Store Co.*, 78 F. 2d 1001, misread its own prior decision. The Court of Appeals for the Seventh Circuit rejected this argument by denying the Petition for Rehearing and we respectfully submit that this Supreme Court should do likewise, by rejecting the instant Petition.

The case of *Weininger et al. v. Metropolitan Fire Ins. Co.*, 259 Ill. 584, cited by petitioners in their Petition here, was also before the Court below. Major emphasis was given to that case by petitioners in their brief on appeal in the Court of Appeals and that court rejected the argument based thereon.

Lastly, respondents can not refrain from commenting upon the rather curious argument of petitioners to the effect that it is for the legislature rather than the court

to determine the quantum of evidence necessary for a finding of fraud. Such a determination has been a traditionally judicial function and we cannot help but wonder at the nature of the statute which would be drafted by a legislature to govern this issue.

It is patent from Rule 52(a) and the decisions of this Supreme Court that a Court of Appeals may set aside findings of fact when said findings are clearly erroneous. The Court of Appeals, in the instant case, in setting aside the findings of the trial court, remained within the well defined ambit of its power and properly performed its function and duty as a court of review. Respondents respectfully submit that the Court of Appeals for the Seventh Circuit has expressed in most positive language a definite and firm conviction that the findings of the trial court were clearly erroneous. The record before that court could lead to no other conclusion.

## CONCLUSION.

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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